MALAYSIAN REPORTS

OOI CHOON LYE v. LIM BOON KHENG & ORS.

[F.C. (Ong C.J. (Malaya) Gill F.J. & Raja Azlan Shah J.) March 24, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 37 of 1970]

Evidence — Witness — Impeachment of credit — Statement to police in course of investigation — Admissibility of in civil case — Evidence Ordinance, 1950, ss. 145 and 155(c).

A statement to the police in the course of investigation is admissible for the purpose of impeaching the credit of a witness in a civil case, there being no prohibition against its use in a civil case so long as it is relevant to the subject matter of the case.

[**Editorial Note:** As the main issue in this case was one of fact and as the learned trial judge based his decision on the opinion he formed as to the comparative reliability of witnesses, it was not open to the Federal Court, as an appellate court, to interfere with that decision. Therefore this report is only in respect of that portion of Gill F.J.'s judgment which dealt with the admissibility in a civil case of a statement made during the course of police investigation.]

Case referred to:-

(1) *Goh Beng Seng* v. *Dol bin Dolah* [1970] 2 M.L.J. 95.

FEDERAL COURT.

Dato' Eusoffe Abdoolcader (*K. K. Chong* with him) for the appellant.

Dato' David Marshall (*Lim Ewe Hock & Mrs. H. H. Oon* with him) for the respondent.

Gill F.J.: ... One of the points of law taken by counsel for the appellant was that the learned trial judge was wrong in allowing Lee Soo Shung (PW2) to be cross-examined on the statement which he had made to Police Superintendent Dershan Singh, it being argued that that statement was inadmissible in evidence. I agree that that statement is not substantive evidence, as was decided by Sharma J. in the case of *Goh Beng Seng* v. *Dol bin Dolah*,(1) on which counsel for the appellant based his argument, but it is clear from section 145 read in conjunction with section 155(c) of the Evidence Ordinance, 1950 that that statement was admissible for the purpose of impeaching the credit of that witness. I think it is a well established rule that every witness upon cross-examination in any civil or criminal proceedings may be cross-examined on a former statement made by him relative to the subject matter of the case and inconsistent with his present testimony. Counsel for the appellant argued that such former statement must be a voluntary statement. For this argument he relied on a heading of a paragraph in *Sarkar* on Evidence (11th edition) page 1291. The words of the paragraph, however, do not support his argument. In any event, how can it be said the statement we are concerned with was not a voluntary statement? It may be argued that this statement was taken in the course of a police investigation under the provisions of the Criminal Procedure Code, and that as such it could be used only in criminal proceedings. I do not think there is any prohibition against its use in a civil case, so long as it is relevant to the subject matter of the case. The police may refuse to furnish a party to a civil action with a copy of such a statement, which I think they are entitled to do, but that is no reason why, if the deputy public prosecutor chooses to supply it, as he did in this case, it cannot be used for the purpose of cross-examination.

....

Order accordingly.

Solicitors: *Presgrave & Matthews; Lim, Lim & Oon.*

FOO KOK FOO v. YAP HAI CHWEE & ORS.

[O.C.J. (Mohamed Azmi, J.) November 17, 1971]

[Kuala Lumpur — Civil Suit No. 1226 of 1968]

Negligence — Road collision — Contributory negligence — Apportionment of blame.

Damages — Quantum — Loss of left-arm — Contributory negligence.

This was a claim for damages for personal injuries and loss suffered by the plaintiff caused by the negligence of the second defendant.

On March 27, 1967, the plaintiff was travelling as a paying passenger in a motor taxi driven by the fourth defendant, when a motor lorry driven by the second defendant suddenly reversed from a side lane and collided with the near-side of the motor taxi. As a result of the impact, the plaintiff, who was seated in front, sustained injuries. His left arm was completely severed at mid-arm level and he also suffered a small laceration on the left lower eye-lid with contusion of the left eye.

The first and second defendants admitted liability, subject to the issue of contributory negligence by the plaintiff. After the close of case for the defendants, the plaintiff withdrew the case against the third and fourth defendants, the registered owner and the driver of the taxi, respectively.

Therefore, the court had to determine whether there was any contributory negligence by the plaintiff, and the quantum of damages to be awarded.

Held: (1) on the balance of probabilities, and on the finding of fact, the plaintiff's left arm was outside the window of the taxi at the time of the collision. This conduct constituted a lack of reasonable care on the plaintiff's part for his own safety, and therefore it was not necessary to show that his conduct amounted to a breach of duty to the taxi driver;

(2) the plaintiff was guilty of contributory negligence to the extent of 25% whilst the second defendant was 75% to blame;

(3) general damages of $25,365, and $4,950 special damages and costs were to be awarded to the plaintiff.

Per Mohamed Azmi J.: "... when travelling in a motor car along a road where traffic is heavy, whether as a driver or a passenger, a person ought to be conscious that it is extremely dangerous even to rest his arm on the door window with or without the elbow protruding. The various follies of road users in a city ... are so common nowadays that they ought to be foreseeable and a prudent man should, when travelling in such a place, keep both his hands well inside his vehicle".

Cases referred to:-

(1) *Nance* v. *British Columbia Electric Railway Co. Ltd.* [1951] A.C. 601 at p. 611; [1951] 2 All E.R. 448 at p. 450.

(2) *Goh Beng Seng* v. *Dol bin Dolah* [1970] 2 M.L.J. 95.

(3) *Khatijah binte Abdullah* v. *Lee Leong Teh & Anor.* [1940] M.L.J. 87.

(4) *Vellama* v. *Eng & Co. & Anor.* [1940] M.L.J. 246.
(5) *Krishnan* v. *Raub Australian Gold Mining Co. Ltd.* [1962] M.L.J. lxxxiii.
(6) *Seng Chong Metal Works Ltd.* v. *Lew Fa* [1966] 2 M.L.J. 63.
(7) *United Plywood and Sawmill Ltd.* v. *Lock Ngan Loi* [1970] 2 M.L.J. 237.
(8) *Van der Velde* v. *Lim Seow Tat & Anor.* [1964] M.L.J. lvii.

CIVIL SUIT.

S. A. Lingam for the plaintiff.

Henry Cheah for the first and second defendants.

M. Shankar for the third and fourth defendants.

Cur. Adv. Vult.

Mohamed Azmi J.: This is a claim for damages for personal injuries and loss suffered by the plaintiff caused by the negligence of the second defendant.

It is not in dispute that on March 27, 1967, the plaintiff was travelling as a paying passenger in a motor taxi driven by the fourth defendant along Ipoh Road from the direction of Sentul Police Station towards the direction of Jalan Tuanku Abdul Rahman. On the way, a motor lorry driven by the second defendant suddenly reversed from a side lane into Ipoh Road and thereby collided with the near-side of the motor taxi. As a result of the impact, the plaintiff who was seated in front next to the taxi driver sustained two injuries. His left arm was completely severed at mid-arm level and he also suffered a small laceration on the left lower eye-lid with contusion of the left eye.

At the commencement of the trial, it was intimated to the court that on the question of liability the first and second defendants admitted liability but subject to the issue of contributory negligence by the plaintiff. After the close of the case for the defence, the plaintiff also withdrew the case against the third and fourth defendants, *i.e.* the registered owner and the driver of the motor taxi respectively. The action is, therefore, only against the first and second defendants and there are only two issues in this case, namely, contributory negligence by the plaintiff and the quantum of damages.

On the balance of probabilities, it is my finding of fact that at the time of the collision the plaintiff's left arm was outside the window of the motor taxi. The taxi driver (DW1) testified that when the plaintiff got into the taxi he saw him putting his left hand outside and holding on to the side roof, although he could not say positively whether the plaintiff's hand was still in that position at the time of impact. From the certified copy of the notes of evidence taken in the lower court (Exhibit D1) the plaintiff also did testify that it was possible that his arm was resting on the window, although he now denies making such statement to the magistrate. I am further fortified in my finding from the admitted fact that the plaintiff's severed left arm was found on the road after the accident and also from the damage to the front near-side door of the taxi as shown in the photograph at page 1 in the agreed bundle of documents. In my view, it is reasonable to assume that the arm could only have been flung out of the car if the plaintiff had placed his hand in the manner as described by the taxi driver. If his arm was merely resting on the door window with the elbow protruding out, the impact caused by the collision would most probably have flung the severed arm into the car rather than out of it. As the only other injury sustained by the plaintiff was a minor one on the left eye, if the arm had been kept inside the car, it could not have been severed and flung on the road, and in any event the injury to the arm would not have been so severe.

As regards contributory negligence, I need only quote the following judgment of Viscount Simon in the case of *Nance* v. *British Columbia Electric Railway Company Ltd.*: (1)

"The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

Counsel for both parties have referred to the case of *Goh Beng Seng* v. *Dol Bin Dolah*(2) where a motor car driver in resting his right arm on the car window while driving and thereby sticking his elbow out all the while even when he saw a motor lorry coming from the opposite direction was held to be 50% to blame. Counsel for the plaintiff, however, submitted that unlike the facts in *Goh Beng Seng's* case, the plaintiff in the present case had no chance at all to withdraw his arm because the accident happened so suddenly when the lorry reversed out from a side lane into the path of the taxi. He also referred to two 1940 cases on the subject which he argued were not considered in *Goh Beng Seng's* case. In *Khatijah binte Abdullah* v. *Lee Leong Teh & Anor.*(3) a passenger in a bus sustained injuries whilst she was seated with her right elbow and forearm resting upon the window sill of the vehicle, and when the collision took place with an oncoming lorry, she was just aware that the lorry was passing but was not looking at it. In holding that there was no contributory negligence, Laville J. said at page 89:

"In my view sitting in the position adopted by plaintiff in this suit is one that is *prima facie* a neutral act. Most buses are so built that the window sill provides a natural rest for the arm and invites its use as such and it is a fact of which I sitting as a jury take cognisance of, that it is a common practice so to sit: in the face of a common practice and no statutory prohibition or actual warning against such an act I hold that it cannot be held as anything but reasonable, and in the circumstances does not show negligence."

In the case of *Vellama* v. *Eng & Co. & Anor.*(4) the plaintiff was also a passenger in a motor bus and the above passage by Laville J. was quoted with approval by Pedlow J.

In my view, both the 1940 cases should no longer be relied upon, in view of the tremendous increase in

the volume of traffic and changes in the design of motor vehicles. In any event, they can be distinguished from the present case and the case of *Goh Beng Seng*, in that, the plaintiff in both cases were passengers in a bus of the type where the window sill provided a natural rest for the arm and invited its use as such. Further, unlike the cases cited above, the accident in the present case took place along one of the busiest thoroughfares in the Federal Capital. In my view, placing his arm outside the door whilst the motor taxi was proceeding along a busy street constitutes a lack of reasonable care on the part of the plaintiff for his own safety. On the authority of *Nance* v. *British Columbia Electric Railway Co., Ltd.* as quoted earlier on, it is not necessary to show that his conduct amounts to a breach of a duty which he owes to the taxi driver. When travelling in a motor car along a road where traffic is heavy whether as a driver or a passenger, a person ought to be conscious that it is extremely dangerous even to rest his arm on the door window with or without the elbow protruding. The various follies of road users in a city such as driving too close to each other, overtaking from the left, reversing or coming out suddenly from a side lane, are so common nowadays that they ought to be foreseeable and a prudent man should when travelling in such a place keep both his hands well inside his vehicle. In this case, I find the plaintiff is part author of his arm injury, and I therefore hold that he is guilty of contributory negligence.

As regards apportionment of blame for the injuries suffered by the plaintiff's, I think his degree of blame is not as high as the plaintiff in *Goh Beng Seng's* case where the driver continued to rest his hand on the window sill even after he had seen a motor lorry approaching from the opposite direction. Whereas in the present case, the plaintiff appeared to have very little chance to withdraw his hand. Under the circumstances, I apportion 25% of the blame to the plaintiff and 75% to the lorry driver (defendant No. 2).

On general damages, a number of authorities involving amputation of the left arm have been cited. On one end of the scale is the case of *Krishnan* v. *Raub Australian Gold Mining Co. Ltd.*[5] where a sum of $10,000 was awarded as general damages to an employee earning between $132 and $140 per month in a machinery accident. On the other side of the scale, is the case of *Seng Chong Metal Works Ltd.* v. *Lew Fa*[6] where an apprentice machine operator aged seventeen years was awarded $43,000 and on appeal to Federal Court, although the appeal was only on the question of liability, Thomson L.P. expressed the view that the award was an extremely generous one.

As regards general damages, according to page 6 of the agreed bundle, the plaintiff was admitted to hospital on March 27, 1967 and discharged on June 15, 1967. He was seen again by the orthopaedic unit of the General Hospital on June 29 the same year when his wound was found completely healed. On January 1, 1968, he was again examined and it was found that the amputated stump had healed well and was ready for application of prosthesis. There is no evidence when he was actually fitted with an artificial arm, but it must have taken place some time in the early part of 1968. Although the plaintiff came to court without the artificial arm because he said it was completely useless, in the absence of medical evidence, I cannot accept that it is so. It is reasonable to assume that the plaintiff was fitted with the artificial arm because there were medical grounds to support that it would improve the functional capacity of the disabled limb. Therefore, the contention that the plaintiff is completely useless in the shoe manufacturing industry must be accepted with a pinch of salt. As a witness, the plaintiff gave me the impression that he had come to court with a set idea of making his incapacity look worse than what it really is. He came to court without the artificial arm when there is no medical evidence to show that it is really useless and should not be worn. Again, he said he was a left-handed person, when there is evidence brought out in cross-examination to show that it is not really so. From what I can observe, apart from the amputated left arm, he still looks robust and in good health.

At the time of the accident, I find the plaintiff was a contractor employed by Luen Seng Brothers Shoe Factory whose major production was for the police and the military. He was paid on commission basis, *i.e.* on piece rate at twenty cents per pair of shoes produced. His duties were as follows: —

(i) to control and supervise between 68 to 75 workers in the technique of shoe making;

(ii) to repair shoe making machines when they went out of order;

(iii) to design shoes.

According to his evidence, he could not carry on with his work because he was unable to adjust the machines and to design shoes. But from the evidence of Chan Seng (PW2), a partner of the Luen Seng Brothers Shoe Factory, the plaintiff's real asset appears to be in his ability to design shoes. As far as repairing machines is concerned, it is not his main occupation. In any event, it is admitted that the shoe factory used very few machines in its operation. Accepting the fact that the plaintiff is a craftsman in designing shoes, I cannot accept the contention that without his left arm he is completely useless in the shoe manufacturing industry. I cannot fathom why it should be impossible for him to go on designing shoes. I agree that with only the right hand, it might reduce the quantity and quality of his work at the beginning, but as he gets used to working with one arm and perhaps with the assistance of the artificial hand, there appears to be no reason why he cannot earn as much as he had done prior to the accident. With his experience as a shoe designer, he can at the very least be employed as a "kepala" in any shoe factory and earn about $350 per month — a salary paid to Yap Yun Hee (PW3). Although the plaintiff had testified that he had been unsuccessful in trying to get a job in the shoe-making industry, there is no proof that he had in fact made any such applications or, if he did, such applications had been turned down. It is true that his former employer has refused to employ him as a contractor, but there is no evidence that his application for a job as a

"kepala" or other lesser job has also been turned down. For the above reasons and taking into consideration other contingencies, I assess the loss of his future earning at $130 per month. At the time of accident, the plaintiff was forty seven years old. Taking his expectation of life at sixty and deducting the period of twelve months during which he was hospitalised up to the time he was fitted with the artificial limb, I would calculate his loss of earnings at $130 per month on twelve years purchase, which comes to $13,821.60. As a round figure, for loss of earnings, I assess a sum of $13,820. As regards pain and suffering for the two injuries and all the disadvantages arising from his disablement including loss of amenities and embarrassments, my assessment would be $20,000. In making these assessments, I have taken into consideration the various authorities cited in the judgment of the Federal Court in *United Plywood and Sawmill Ltd.* v. *Lock Ngan Loi*[7] where a sum of $35,000 awarded as general damages for loss of left arm to a twenty two year-old general labourer earning between $85 and $90 per month was reduced to $27,000 on appeal. I have also taken into consideration the Singapore case of *Van der Velde* v. *Lim Seow Tat & Anor.*[8] where a thirty two year-old bank officer earning $1,000 to $1,200 per month was awarded $45,000 general damages for loss of right arm halfway between the elbow and the shoulder. Although in that case, the plaintiff's promotion prospects were not impaired and his salary since the accident had been increased by normal increments, consideration should also be taken of the following facts:—

(a) the plaintiff in the present case was forty seven years old at the time of accident;

(b) his income was only about half of that of the bank officer;

(c) he lost his left arm instead of right arm.

Taking the above two cases as rough guides, in my view, it is fair and reasonable to assess a sum of $33,820 as general damages in this case.

As regards special damages, in the absence of rebutting evidence, I accept the evidence of the plaintiff as supported by Exhibit P2 that he was earning a minimum of $500 per month. I take this as his average income. For loss of income from March 27, 1967 to the date when his wounds were completely healed and his left arm fitted with artificial limb — a period of twelve months — I award a sum of $6,000. In the absence of documentary proof, I would not allow anything on private medical treatment, but I would allow only $350 for expenses incurred on nourishing food. I would allow $240 for travelling expenses for the plaintiff's family and also $10 for cost of the medical report. The total amount for special damages is therefore $6,000.

As I have found the plaintiff to be 25% to blame, I therefore give judgment for the plaintiff against the first and second defendants as follows:—

(a) Special Damages — $4,950;

(b) General Damages — $25,365;

(c) Costs.

Judgment for the plaintiff.

Solicitors: *S. A. Lingam & Co.; Allen & Gledhill; Shearn, Delamore & Co.*

WENG LOK MINING CO. LTD. v. HIAP LEE (CHEONG LEONG & SONS) BRICKMAKERS LTD.

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) December 31, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 34 of 1971]

Tort — Negligence — Rule in Rylands v. Fletcher — Nuisance for escape of water from reservoir — Liabilities.

This was an appeal from the judgment of the High Court, Kuala Lumpur, whereby the appellants/defendants, a mining company, were held liable for negligence, liable under the rule in *Rylands* v. *Fletcher*[1], and liable in nuisance for the escape of water from a reservoir on their land.

The respondents, a brick-making firm, were awarded $3000 in general damages and costs. Their claims for special damages amounting to $19,713, and for an injunction, were dismissed because they "were characterised by the poor quality of evidence tendered and the general lack of proof".

This appeal was against the whole of the decision of the trial court.

Held, allowing the appeal: (1) for the rule in *Rylands* v. *Fletcher*[1] to apply in this case there must be proof of escape of water;

(2) the respondents' evidence failed to establish any of the liabilities alleged against the appellants.

Cases referred to:-

(1) *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.

(2) *Read* v. *Lyons & Co. Ltd.* [1947] A.C. 156.

(3) *Hoon Wee Thim* v. *Pacific Tin Consolidated Corporation* [1966] 2 M.L.J. 240.

(4) *Smith* v. *Kenrick* (1849) 7 C.B. 515; 137 E.R. 205.

(5) *Baird* v. *Williamson* (1863) 15 C.B. (N.S.) 376; 143 E.R. 831.

FEDERAL COURT.

S. D. K. Peddie for the appellants.

S. B. Menon for the respondents.

Azmi L.P.: I have the opportunity of reading the judgment of my brother Ali F.J. and agree with him that the appeal should be allowed for reasons stated by him.

The respondents will therefore pay the costs of this appeal and of the trial in the court below. The deposit of $500 will be returned to the appellants.

Ali F.J.: This is an appeal from the judgment of the High Court, Kuala Lumpur, whereby the appellants, a mining company, were held liable for negligence, liable under the rule in *Rylands* v. *Fletcher*,[1] and liable in nuisance for the escape of water from a reservoir on their land. The respondents, a brick-making company or firm, were awarded $3,000 in general damages and costs. Their claim for special damages amounting to $19,713 in respect of five items of loss was dismissed. The reasons for the dismissal was stated by the learned trial judge in these words: